

DAVID B. HERMAN :  
 : Civil Action  
Plaintiff, :  
 :  
v. :  
 :  
CITY OF ALLENTOWN :  
 : No. 96-6942  
Defendant. :

January 15, 1998

## I. BACKGROUND

Defendant, City of Allentown ("City"), has filed a motion for post-trial relief asking us to reconsider our decision and grant a new trial in Herman v. Allentown, --- F. Supp. ---, Civ. 96-6942, 1997 WL 727698, \*1 (E.D. Pa. Nov. 21, 1997). We deem this to be a motion pursuant to Fed. R. Civ. P. 59(a). After a bench trial, this court held that the Defendant discriminated against Plaintiff, in violation of the Americans With Disabilities Act ("ADA"), 42 U.S.C. § 12101 et seq, by failing to rehire the Plaintiff because of the City's erroneous belief that he was abusing drugs. We ordered the City to rehire the Plaintiff and awarded the Plaintiff back pay (with interest) and attorneys fees. Herman, 1997 WL 727698 at \*15-16. Because

the facts of this case have been previously discussed in detail, see id. at \*1-5, we will not repeat ourselves here.

Defendant asserts that a new trial is needed because this court incorrectly admitted evidence of settlement agreements in violation of Federal Rule of Evidence ("FRE") 408.

Defendant's Brief in Support of Post-Trial Motions (hereinafter "Defendant's Post-Trial Brief") at 1-6. Defendant also claims that this court's verdict went against the great weight of the evidence. Defendant's Post-Trial Brief at 7-12. Following a bench trial, a court may grant a new trial when a party seeks the examination of newly discovered evidence or the court made a manifest error of law or fact. See Eastwick Paper Stock Co., Inc. v. Grill Corporation, Civ. A. No. 93-3277, 1994 WL 689274, \*1, \*2 (E.D. Pa. Dec. 5, 1994). The decision whether or not to grant a new trial is committed almost entirely to the discretion of the district court. Id. For the reasons that follow we will deny Defendant's Motion for Post-Trial Relief.

## II. DISCUSSION

### A. Federal Rule of Evidence 408

Defendant argues that this court incorrectly admitted evidence regarding settlement agreements in violation of FRE 408. We disagree.

As we have already discussed in our prior Decision, FRE 408 does not bar the admission of the settlement agreements in this case, when Plaintiff's cause of action stems from the Defendant's breach of the settlement agreements and not from the claim that the agreements were trying to settle. "'Rule 408 codifies the long-standing axiom in federal courts that compromises proposed or accepted are not evidence of an admission of the validity or invalidity of the claim or the amount of damage.'" Herman, 1997 WL 727698 at \*9 (quoting 2 JACK. B. WEINSTEIN & MARGARET A. BURGER, WEINSTEIN'S FEDERAL EVIDENCE, § 408.03[1], at 408-10 (2nd ed. 1997)); see also Affiliated Manufacturers, Inc. v. Aluminum Company of America, 56 F.3d 521, 526 (3d Cir. 1995) ("Affiliated").

The primary rationale behind FRE 408 "is the obvious public policy interest in encouraging settlement of private disputes." Lo Bosco v. Kure Engineering Limited, 891 F. Supp. 1035, 1037-38. (D. N.J. 1995). Thus, in the paradigmatic Rule 408 case, "a plaintiff who slipped and fell outside the defendant's home would be barred from introducing evidence that the defendant had offered to settle the case for \$10,000," since without FRE 408, "the defendant's offer to settle could be parlayed into proof of liability which would discourage the defendant from ever even considering settling the case." Herman, 1997 WL 727698 at \*9.

Plaintiff's case, however, is far from being the traditional type of case barred by FRE 408. Indeed, the admission of the settlement agreements in Plaintiff's case is not barred by the language of the statute, since the settlement agreements are not being admitted to show Defendant's liability for the underlying claims being settled. The settlement agreements settled Plaintiff's claim that he was wrongly fired by the City. Whether or not the City wrongly fired the Plaintiff is not at issue in the Plaintiff's case. In fact, we have already stated that the City had every right to terminate the Plaintiff from the fire department. The issue in Herman is whether the Defendant violated the ADA when it refused to rehire the Plaintiff in breach of the settlement agreements. Thus, technically the admission of the settlement agreements in Herman are not barred by the language of FRE 408 since Herman does not litigate the claims which the settlement discussions were supposed to settle. Indeed, as Frieman v. USAir Group, Inc. points out, there is ample authority to support the proposition that "Rule 408 only bars evidence of settlement discussions concerning the compromise claim." Civ. A . No. 93-3142, 1994 WL 675221, \*1, \*9 (E.D. Pa. Nov. 23, 1994).

For example, in Vulcan Hart Co. (St. Louis Division) v. NLRB, 718 F.2d 269, 276-77 (8th Cir. 1983), the NLRB found Vulcan Heart guilty of unfair labor practices, in part for making the

reinstatement of an employee after a strike conditional on the employee's resignation from union office. The demand that the employee resign union office arose during negotiations to settle the employee's discharge grievance. The Eighth Circuit held that because "the discharge claim is not at issue in this proceeding," all "statements [Vulcan Heart] made in the course of the negotiations are not excludable under Rule 408." Id. at 277 (emphasis added).

Defendant tries to distinguish Vulcan Heart by claiming that the reason the court admitted the evidence in that case was because "the discussions in the contract dealing with [employee's] discharge were not related to the strike and therefore, were admissible in the subsequent suit." Defendant's Post-Trial Brief at 6 (emphasis added). Defendant claims that Vulcan Heart does not apply to Herman where both the settlement agreement and the Plaintiff's case are related because they involve the Plaintiff returning to work. Defendant's attempt to distinguish Vulcan Heart fails for two reasons. First of all, the fact that Vulcan Heart would only rehire the employee after the strike by the union employees if the employee resigned his union leadership position was in fact related to the strike and, more importantly, to the NLRB's suit for unfair labor practices. Second, the court does not focus on whether the two claims are related, but on the fact that "the discharge claim is not at

issue in this proceeding." Vulcan Heart, 718 F.2d at 277. Thus, the settlement agreement issues in Herman and Vulcan Heart are very similar. Just like the employee's discharge claim in Vulcan Heart was not at issue in the NLRB suit, Plaintiff's claim that he was illegally fired from the City was not at issue in his ADA suit.

The court in Broadcort Capital Co. v. Summa Medical Co., 972 F.2d 1183, 1194 (10th Cir. 1992)(hereinafter "Broadcort"), also held that FRE 408 only applies to bar evidence of settlement discussions concerning the compromise claim. In Broadcort, the Tenth Circuit held that a district court did not err by allowing a witness to testify as to settlement discussion involving a different dispute. Broadcort sued Summa for failing to transfer and register a stock certificate to Broadcort. Id. at 1185. Summa claimed that it refused to transfer the shares because they were to be held as collateral for a loan to a Summa subsidiary. Id. At trial, the court allowed the Plaintiff to question a witness about settlement discussions related to a prior loan transaction where share of Summa stock served as collateral. Id. at 1194. The defendant, on appeal, argued that the court erred in admitting this evidence in violation of FRE 408. Id. The appellate court held that the evidence was admissible since it "related to an entirely different claim [and]

the evidence was not admitted to prove the validity or amount of the 'claim under negotiation.'" Id. (internal quotation omitted).

Defendant tries to distinguish Broadcort by pointing out that the case involved a "conflict between other parties and a similar pattern of behavior." Defendant's Post-Trial Brief at 3-4. We do not find Defendant's attempt to distinguish Broadcort to be convincing. First, technically speaking, the settlement at issue in Herman involved different parties than the ADA case. The settlement was between the City and the Union; the ADA case was between the City and Mr. Herman. Second, and more important, Broadcort does not explain the inapplicability for FRE 408 by stating that the parties were different. The court focused on the fact that the claim in the settlement was different from the claim at trial. Thus, the reasoning in Broadcort easily applies to Herman where the claims at settlement and the claims at trial are two different claims.

Defendant further argues that we should not follow the reasoning set forth in Vulcan Heart and Broadcort; and that we should instead follow a New Jersey district court's lead in Lo Bosco to read FRE 408 broadly to bar the admission of the settlement agreements in this case, even though they involve different disputes. We refuse to read FRE 408 broadly in this case because to do so would controvert the policy reason behind Rule 408: encouraging settlement agreements.

As Lo Bosco points out, the primary rationale behind FRE 408 "is the obvious public policy interest in encouraging settlement of private disputes." Lo Bosco, 891 F. Supp. at 1037-38. In Lo Bosco, the district judge refused to permit the defendant in breach of employment contract case to admit letters written by the plaintiff to his estranged wife, the defendant's daughter, "offering to drop the lawsuit if it [would] effect a reconciliation of the couple." Id. at 1036-37. The defendant argued that these letters should be admitted because they "were an attempt to compromise the impending divorce proceeding," a different proceeding than the breach of contract case on trial. Id. at 1038. The court disagreed, citing public policy considerations. The court held that the "policy behind Rule 408 may be so strongly implicated in some situations that the spirit of the rule would be violated by allowing evidence of settlement negotiations in a prior case to be admitted into evidence." Id. at 1039. The court cited to cases such as Fiberglass Insulators, Inc. v. Dupuy, 856 F.2d 652 (4th Cir. 1988), and Williams v. Fermenta Animal Health Co., 984 F.2d 261, 264 (8th Cir. 1993), which barred the admission of settlement negotiations in cases related to the settlements because the "policy rationale of Rule 408 to promote uninhibited settlement negotiations mandated the exclusion of the [settlement] discussions." Lo Bosco, 891 F. Supp. at 1038. Thus, the court held that "where cases are

related, the better view is that Rule 408 may exclude settlement proposals in one from admission into evidence in another." Id. (emphasis added).

First of all, it should be noted that Lo Bosco did not hold that FRE 408 required the exclusion of the evidence. By stating that the rule "may exclude," and not "must exclude," the court recognized that exclusion in this situation was permissive and not mandatory. Furthermore, the court based its decision on the public policy favoring settlements; a public policy which is not implicated in the Plaintiff's case.

Herman is readily distinguishable from Lo Bosco and the cases which it cites. The divorce settlement discussions at issue in Lo Bosco involved settling the very breach of contract case at trial where defendant sought to admit those negotiations. Thus, the public policy concern of promoting settlement was at its zenith in Lo Bosco. The plaintiff would not have likely proposed to drop his breach of contract suit in the divorce action if he thought that his offer would have been admissible in the breach of contract action.<sup>1</sup>

By contrast, barring the settlement agreement in Herman would not support FRE 408's policy in favor of settling lawsuits.

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1. FRE 408's policy favoring settlements was also at its highpoint in Fiberglass Insulators and Williams, the cases cited by Lo Bosco to support its conclusion. See Lo Bosco, 891 F. Supp. at 1038.

In fact, using FRE 408 in Mr. Herman's case would controvert this important public policy. Plaintiff's ADA case is based, in large part, on the Defendant's failure to adhere to the settlement agreement. Barring evidence of the terms of a settlement agreement in a trial involving the breach of that settlement agreement would make the enforcement of settlement agreements nearly impossible. Such a policy would surely dissuade parties from even entering into settlement agreements. Why should a party enter into a settlement agreement when the other side can breach the agreement with impunity since the terms of the settlement cannot be admitted in the suit involving the breach? Indeed, "it would be patently unfair to preclude the admission of the settlement agreement when the actions that constitute the alleged discrimination arise out of the Defendant's altering of the agreement." Herman, 1997 WL 727698 at \*15 n.1.

Thus, reading FRE 408 broadly, in a manner that goes beyond the scope of the statute, to bar admission of the settlement agreements in Herman when those agreements are not offered to prove liability for or invalidity of the claim under negotiation, would controvert the very public policy behind Rule 408 itself. Therefore, we stand by our original holding in Herman allowing the Plaintiff to use the unlawful discharge settlement agreements to prove that the City failed to rehire him under the ADA.

B. The Weight of the Evidence Supports Our Finding for the Plaintiff

Defendant asserts that this court should grant it a new trial because our decision was against the great weight of the evidence. Defendant's Post-Trial Brief at 7. Defendant tries to demonstrate this by attacking ten of the findings of fact made in Herman. Nine of Defendant's attacks have little or no merit. And, while we technically agree with Plaintiff's assertion with regard to Finding of Fact No. 33 -- that the City, and not Ms. Lilly, amended the settlement agreement -- this has no bearing on our determination that the City discriminated against the Plaintiff, Mr. Herman.

Thus, all but one of Defendant's attacks on our findings of fact miss the mark. In any case, attacking any one (or ten) individual findings of fact is not enough to merit a new trial. Defendant must show that the court's ultimate decision goes against the great weight of the evidence. This the City fails to do. We will therefore refuse to grant Defendant a new trial.

**1. Finding of Fact No. 13**

Defendant attacks Finding of Fact No. 13 by distorting it. The defense claims that this court found that Plaintiff "'did not evidence [sic] any present form of dependency on alcohol or other drug,'" based upon Mr. O'Donnell's first evaluation of the Plaintiff. Defendant's Post-Trial Brief at 7

(quoting Herman, 1997 WL 727698 at \*2). The City asserts that based upon McDaniel v. Mississippi Baptist Medical Center, 877 F. Supp. 321 (S.D. Miss. 1995), and Baustin v. State of Louisiana, 910 F. Supp. 274 (E.D. La. 1996), Mr. O'Donnell's diagnosis was too close in time to Plaintiff's purported drug use to support a finding that Plaintiff was no longer using drugs. First of all, neither of these other district court cases are controlling on this court. Second, this finding of fact did not, itself, actually hold that Plaintiff was no longer using drugs. It merely stated Mr. O'Donnell's first diagnosis: "13. Mr. O'Donnell, after evaluating Plaintiff on May 12, 1994, found that he 'does not evince any present form of dependency on alcohol or any other drug.'" Herman, 1997 WL 727698 at \*2. Thus, Defendant distorts this finding by making it seem that the court's determination that Plaintiff was no longer using drugs at the time he was discriminated against was based solely on Mr. O'Donnell's first diagnosis. This is clearly not the case. We based our finding that Plaintiff was no longer using drugs at the time the City failed to rehire him on the testimony of Dr. Stolz, Defendant's own expert witness (Finding of Fact No. 28, Tr. 9/22/97 at 82), on a second evaluation by Mr. O'Donnell clearing Plaintiff to return to work sometime after February 1, 1995 (Finding of Fact No. 25, Tr. 9/22/97 at 65-67, 97), and on the uncontroverted and believable testimony of Mr. Herman (Finding of

Fact No. 14, Tr. 9/22/97 at 10-11, 28-29, 99). Therefore, Finding of Fact No. 13 was supported by sufficient evidence.

## **2. Finding of Fact No. 24**

Defendant asserts that Finding of Fact No. 24, which states that Fire Chief Novosat and Ms. Lilly "were disgusted that Plaintiff tested positive for cough medicine," is not supported by sufficient evidence. Herman, 1997 WL 727698 at \*3. The evidence clearly shows that Chief Novosat was disgusted with the Plaintiff when he found out that Plaintiff had taken cough medicine. This is demonstrated by Chief Novosat's deposition testimony which was read into the trial record:

Question: All right, why would anybody be disgusted with him because he tested positive for some kind of cough medicine?

Answer: Well, because I mean you're putting it the same class with Hydracodone (ph.) and everything else and Percocet and whatever because it's a derivative from it.

Question: How do you know that?

Answer: Just through conversations with Jenny Lilly and whatever; we look[ed] in the medical book.

Question: You [looked] an a medical book?

Answer: I didn't, Jenny Lilly did.

Question: So Jenny Lilly was disgusted?

Answer: Jenny Lilly mentioned it to me.

Answer: Who was disgusted-- rather,

Question: Who was disgusted?

Answer: I was disgusted, as well as, you know, any people that I talked to saying what [is it] with this guy, we're giving him a chance to come back and he's dirty again.

Tr. 9/22/97 at 63-64.

Thus, Chief Novosat plainly admitted that he was disgusted with the Plaintiff. Furthermore, Mr. Novosat testified that Ms. Lilly was disgusted with the Plaintiff as well:

Question: So Jenny Lilly was disgusted?

Answer: Jenny Lilly mentioned it to me.

Tr. 9/22/97 at 64.

And, when asked who was disgusted, Chief Novosat responded that any people he talked to about the subject was disgusted. Chief Novosat said this immediately after discussing how he and Ms. Lilly had talked about Mr. Herman taking the cough medicine. Therefore, our conclusion that Ms. Lilly was disgusted with the Plaintiff was supported by Chief Novosat's deposition testimony.

We further find that Ms. Lilly's actions in this case support our conclusion that she was disgusted with the Plaintiff. For example, Ms. Lilly told Dr. Stolz that Plaintiff failed a second drug test when one was never given. She also refused Plaintiff's reasonable request to attend a drug program covered by his insurance that the City's own doctor said was substantially similar to Dr. Stolz's program. Therefore, we

believe that Finding of Fact No. 24 is supported by the evidence in this case.

### **3. Finding of Fact No. 25**

Defendant further attacks Finding of Fact No. 25, which states that:

After the positive drug test, Ms. Lilly had Plaintiff re-evaluated by Mr. O'Donnell, the Director of the Lehigh County Drug and Alcohol Unit. Tr. 9/22/97 at 64. Mr. O'Donnell had a contract with the City and was called upon to evaluate City employees in connection with its EAP program. As a result of the evaluation, Mr. O'Donnell cleared Plaintiff to go back to work sometime after February 1, 1995. Tr. 9/22/97 at 65-67, 97.

Herman, 1997 WL 727698 at \*3.

Defendant attacks our finding that Ms. Lilly had the Plaintiff re-evaluated by Mr. O'Donnell in 1995. On direct examination, Ms. Lilly agreed that "at some time after February of 1995 Mr. Herman was sent to see a Richard O'Donnell." Herman, Tr. 9/22/97 at 65. She then later stated that she was "not sure if we sent him or if he went voluntarily; in any even, he did go." Tr. 9/22/97 at 66. Later on, Ms. Lilly testified that she had asked Mr. O'Donnell to recommend a doctor to evaluate the Plaintiff and that he recommended Dr. Stolz. Tr. 9/22/97 at 100. We concluded, after listening to the testimony, that Plaintiff was indeed sent by the city to be re-evaluated by Mr. O'Donnell in 1995. Even though Ms. Lilly did later backtrack, she did initially testify that the City sent the Plaintiff to see Mr.

O'Donnell. Tr. 9/22/97 at 65. Furthermore, the fact that she communicated with Mr. O'Donnell around that same time to get the name of a doctor to evaluate the Plaintiff tends to support the conclusion that she had sent Mr. Herman back to see Mr.

O'Donnell.

In any case, even if Defendant is correct that Plaintiff was not sent to Mr. O'Donnell by the City a second time and that he went to Mr. O'Donnell voluntarily, this fact has no bearing on our decision that the City discriminated against the Plaintiff. We would have reached the same conclusion even if we had held that Plaintiff saw Mr. O'Donnell a second time on his own accord.

#### **4. Finding of Fact No. 26**

Defendant attacks Finding of Fact No. 26, which states: "Not satisfied with Mr. O'Donnell's evaluation, Ms. Lilly then referred Plaintiff to be examined by Dr. Ralph Stolz[.]" Herman, 1997 WL 727698 at \*3. Defendant disagrees with our finding that Ms. Lilly was not satisfied with Mr. O'Donnell's evaluation. Defendant's Post-Trial Brief at 8. Defendant asserts that there is no indication that Ms. Lilly was not satisfied with Mr. O'Donnell's evaluation and that the settlement agreement required Plaintiff to be evaluated by a physician. Defendant is correct about the settlement agreement's requirement that Mr. Herman see a doctor. Still, the fact that she sent Plaintiff to see Dr.

Stolz, after Mr. O'Donnell had cleared Plaintiff to return to work, suggests that Ms. Lilly was not satisfied to rely on Mr. O'Donnell's opinion. We feel that our conclusion that Ms. Lilly was not satisfied is a fair implication. In any case, even if Ms. Lilly were satisfied with Mr. O'Donnell's evaluation, this fact would have no bearing on our determination that the City discriminated against the Plaintiff.

#### **5. Finding of Fact No. 30**

Defendant attacks our finding that Ms. Lilly called Dr. Stolz and told him that Plaintiff failed a second drug test when no such drug test was ever given. Defendant correctly points out that Ms. Lilly testified that she never told Dr. Stolz about Plaintiff failing a second drug test. Tr. 9/22/97 at 112. However, after listening to all the testimony in the case we decided to credit the testimony of Dr. Stolz, who stated that Ms. Lilly told him that Plaintiff had failed a second drug test. Dr. Stolz testified, in response to cross-examination:

Q. Then at some time did you get a call that [madel] you revise your report?

A. That -- and, again I'm doing this from recall -- that --

Q. We know that, we don't have any notes.

A. That's correct. That he had a second test and that was also positive.

Q. Well, didn't you know that already . . .  
.

A. I knew there had been an initial blood -- an initial drug screen had been done, that was positive, and that what -- what I had referred to was that he refrain, total abstinence from all mood-altering chemicals, which included that cough medication. When I had the phone call from Ms. Lilly, it was my understanding that he had a second urine drug screen, and that one after he had made a visitation to me, and that also was then positive.

Q. And that was told to you by Ms. Lilly?

A. That is correct.

Tr. 9/22/97 at 92.

Defendant tries to characterize Dr. Stolz's testimony as "somewhat uncertain." Defendant's Post-Trial Brief at 10. We do not find that to be the case. Dr. Stolz testified that Ms. Lilly told him that Plaintiff failed a second drug test and that he relied on this information add the requirement that Plaintiff participate in an intensive drug therapy program before he return to work. In deciding to credit Dr. Stolz's testimony over Ms. Lilly's, we took into consideration the fact that Dr. Stolz was the Defendant's own witness, who had no interest in bolstering the Plaintiff's case. Ms. Lilly, on the other had, was an agent of the Defendant who was personally involved in the discrimination against the Plaintiff. Therefore, in our mind, Dr. Stolz was the more credible of the two witnesses.

Furthermore, we would have found for the Plaintiff even had we determined that Ms. Lilly did not provide Dr. Stolz

inaccurate information regarding a second drug test. We found that Defendant discriminated against Mr. Herman not only by altering the settlement agreement to require Plaintiff to participate in the in-patient drug treatment program, but also by unreasonably refusing to allow him to participate in a program that was covered by his insurance. Whether or not Ms. Lilly imparted information regarding a second drug test to Dr. Stolz has nothing to do with whether the City discriminated against the Plaintiff by refusing to allow him to participate in an alternative treatment program. Therefore, we would have still found for the Plaintiff, even if we had credited Ms. Lilly's testimony regarding the second drug test.

#### **6. Finding of Fact No. 32**

Defendant asserts that "Finding of Fact No. 32 seems to indicate that there [were] two items of false information, namely the second drug test as well as the past medical history." Defendant's Post-Trial Brief at 10. Defendant misunderstands the court. We did not mean to imply that the information Ms. Lilly gave to Dr. Stolz regarding Plaintiff's medical history was false. The only false information provided by Ms. Lilly was about the nonexistent second drug test.

#### **7. Finding of Fact No. 33**

Defendant is correct that it was the City and not Ms. Lilly, personally, who amended the settlement agreement and we

deem this finding amended to reflect this fact. However, whether or not Ms. Lilly herself amended the agreement is irrelevant to our decision.

**8. Finding of Fact No. 34**

Defendant attacks this finding which states that "Plaintiff was willing to submit to the drug treatment program recommended by Dr. Stolz, but for the fact that he could not afford the cost of the program which was approximately \$7000." Defendant attacks our conclusion that the cost of the program was \$7000 by stating that the evidence regarding the program's cost was inadmissible hearsay for which a proper objection was made. Defendant's Post-Trial Brief at 11. The record shows that Defendant never objected to this evidence:

Q. Do you know why he wasn't reinstated?

A. Yes.

Q. Why is that?

A. He was supposed to attend a counseling program through the Osteopathic Hospital and he had to pay for it which was over \$7000 and we didn't have the money to pay for it. And it was not covered under my insurance.

Q. What effect did the City's refusal to reinstate your husband have on your husband, David?

[DEFENSE COUNSEL]: Objection, Your Honor.

A. THE COURT: Sustained.

Tr. 9/22/97 at 13.

It is clear from the transcript that Defendant did not object to Mrs. Herman's statement that the program cost \$7000, but to the question which followed it. Therefore, since the Defendant did not object to Mrs. Herman's testimony, we were free to consider it. In any case, the actual cost of the program is irrelevant. What is significant is the Plaintiff told Ms. Lilly that he could not afford to submit to the AMC Drug Treatment Program since it was not covered by his insurance plan. Tr.9/22/97 at 35-37, 58, 110.

#### **9. Finding of Fact No. 36**

The City attacks our finding that the drug treatment program that Mr. Herman requested to take was the substantial equivalent to the program offered by Dr. Stolz. Though we did not allow Mr. Herman to testify that to this fact, Dr. Stolz, the Defense's own witness, testified that Mr. O'Donnell's program was the functional equivalent of Dr. Stolz's program. Tr. 9/22/97 at 93.

#### **10. Finding of Fact No. 38**

Defendant attacks our finding that though "Ms. Lilly did find a drug treatment program through Barks County that would have been covered by Plaintiff's insurance . . . she never informed Plaintiff about this program." Herman, 1997 WL 727698 at \*4. While Ms. Lilly claims that she mentioned to Plaintiff that such a program existed, Tr. 9/22/97 at 104, she admits that

she never informed the Plaintiff that he could actually take this program. Tr. 9/22/07 at 108. When Ms. Lilly was asked on cross-examination why she "just didn't call Mr. Herman and tell him about the Barks County program," her only response was "I really don't remember, I don't remember." Tr. 9/22/97 at 110-11.

Defendant focuses on the fact Ms. Lilly testified that she told the Union that the Barks County program existed and that she did not speak to Mr. Herman because "by that point the Union was representing him and I was no longer in contact with him." Tr. 9/22/97 at 108. We do not find this testimony credible. The Union represented the Plaintiff from the beginning regarding his termination. The first settlement agreement, which did not require the Plaintiff to attend an intensive drug therapy program, was between the City and the Union. Thus, to say that the reason she did not tell Plaintiff that he could take the Barks County program was because the Union was now representing him does not hold water: the Union was representing from the beginning. Furthermore, later on in cross-examination, Ms. Lilly abandons this position. As we have stated, when Ms. Lilly was later asked on cross-examination why she "just didn't call Mr. Herman and tell him about the Barks County program," her only response was "I really don't remember, I don't remember." Tr. 9/22/97 at 110-11.

While we do not believe Ms. Lilly's explanation for why the City did not allow Plaintiff to take an alternative drug program, we do credit Mr. Herman's testimony that he spoke with Ms. Lilly about not being able to afford Dr. Stolz's program and that the City "was not willing to accommodate [his] situation [by letting him] go to [the] alternative drug program that [he] could have afforded." Tr. 9/22/97 at 37. Indeed, Plaintiff called Ms. Lilly on numerous occasions to try and find out why the City refused to rehire him, Tr. 9/22/97 at 38-39, and never once did she tell Plaintiff he could take an alternative treatment program.

Thus, for the above stated reasons, we do not believe that our conclusion that the City unreasonably refused to allow Plaintiff to take an alternative drug treatment program goes against the great weight of the evidence.

**11. Defendant Fails to Show that the Court's Decision Went Against the Great Weight of the Evidence**

Only one of Defendant's attacks on our findings of fact succeeds. And, the fact that the City, and not Ms. Lilly, amended the settlement agreement does not demonstrate that the Court's finding of discrimination went against the great weight of the evidence. However, even if grand majority of Defendant's attacks on our findings of fact succeeded, the City would still not be entitled to a new trial.

Even if Finding No. 13 were incorrect, this court's decision that Plaintiff was no longer using drugs was not based solely Mr. O'Donnell's report. Our finding was substantiated by the testimony of the Plaintiff and of Dr. Stolz, the Defendant's own witness.

Even if Finding No. 24 were incorrect, and Ms. Lilly was not disgusted with the Plaintiff for taking cough medicine, her actions and the actions of the City still discriminated against Mr. Herman.

Even if Finding No. 25 were incorrect, and Plaintiff was not sent to Mr. O'Donnell a second time by the City, this has no bearing on our conclusion that the City discriminated against the Plaintiff by requiring Mr. Herman to attend an in-patient drug treatment program and by refusing to allow him to attend a program covered by his insurance.

Even if Finding No. 26 were incorrect, and Ms. Lilly was satisfied with Mr. O'Donnell's evaluation of the Plaintiff, this still does not effect our decision that the City discriminated against the Plaintiff.

Even if Finding No. 30 were incorrect, and Ms. Lilly did not impart Dr. Stolz false information about a second drug test, this would have no bearing on our decision since we found that Defendant discriminated against Mr. Herman, not only by altering the settlement agreement to require Plaintiff to

participate in the in-patient drug treatment program, but also by unreasonably refusing to allow him to participate in a program that was covered by his insurance.

And, even if Finding No. 34 were incorrect, and we were not allowed to consider the actual price of Dr. Stolz's treatment program, this would not effect our decision since the actual cost of the program is irrelevant. What is significant is the Plaintiff told Ms. Lilly that he could not afford to submit to Dr. Stolz's treatment program and she refused to allow him to take a functionally equivalent program.

Therefore, for all of the discussed reasons, we find that our decision in Herman did not go against the great weight of the evidence and we refuse to grant the Defendant a new trial.

### III. CONCLUSION

Defendant is not entitled to a new trial. This court correctly entered evidence of the two settlement agreements since these agreements did not try to settle the instant case and thus were not barred by FRE 408. Furthermore, Defendant failed to show that the court's decision went against the great weight of the evidence. Defendant's Motion for Post-Trial Relief is denied.

An appropriate Order follows.